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## SOME NOTES ON THE CIVIL JURY IN HISTORICAL PERSPECTIVE

Lawrence M. Friedman\*

It is an interesting fact that there is no full scale history of the American jury. What there is—and the literature is not large—deals mostly with criminal cases. The criminal jury, after all, is much more in the public eye than the civil jury. Everybody sees trials on television and in the movies. Civil cases are, on the whole, pale and bloodless in comparison. As a consequence, when ordinary people think about “the jury,” they *usually* have the criminal jury in mind. This also seems to be true of some jury scholars. At least one recent, and rather good book, Jeffrey Abramson’s *We, the Jury*, is subtitled *The Jury System and the Ideal of Democracy*.<sup>1</sup> Although the title does not say so, the book is entirely about criminal juries.<sup>2</sup> The same is true of the classic study, *The American Jury*, by Harry Kalven and Hans Zeisel, published in 1966.<sup>3</sup> At the time, Kalven and Zeisel also promised a volume about the civil jury; but no such book ever appeared.<sup>4</sup>

Thus, the criminal jury gets the lion’s share of the attention and the civil jury sits home among the ashes. It is most definitely “unappreciated.” That word appears in one of the very rare studies of the history of the civil jury,<sup>5</sup> Stephan Landsman’s 1993 article, which is subtitled *Scenes from an Unappreciated History*.<sup>6</sup>

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\* Marion Rice Kirkwood Professor, Stanford University School of Law.

1. JEFFREY ABRAMSON, *WE, THE JURY* (1994).

2. Some of the scholarly studies, notably Valerie P. Hans and Neil Vidmar’s study, *JUDGING THE JURY*, contain material on the civil as well as the criminal jury. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

3. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966).

4. For hints about what the study was finding or would have found or did find, see Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

5. With regard to English law, there is THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985), on the history of the English criminal jury. As far as I know, there is no comparable history of the *civil* jury.

6. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993) [hereinafter Landsman, *Unappreciated History*]; Stephan Landsman, *The History and Objectives of the Civil Jury System*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 22 (Robert E. Litan ed., 1993).

In a way there is something paradoxical about this general neglect. It is actually the civil jury, not the criminal jury, that is in the hurricane of controversy. Kalven and Zeisel recognized this in the 1960s: "most of the unrest over the jury," they remarked, was "limited to its use in civil trials."<sup>7</sup> This had, in fact, been true for a long time. I think it may be a shade less true today, in the light of the fuss over the O.J. Simpson trial and the Rodney King affair and the like. When the Simpson trial ended, there was a certain amount of muttering, and some proposals for reform; but the fuss died down after a while, and nothing seems to have come of it. The noise over the *civil* jury, however, has not subsided—most notably with regard to tort law, products liability, and medical malpractice—but more generally as well.<sup>8</sup> As Stephen Daniels and Joanne Martin put it, juries "lie at the heart of the ongoing public policy debate over reform in the American civil justice system."<sup>9</sup> They are accused of all sorts of crimes and dysfunctions, mostly imaginary.<sup>10</sup>

There is in fact an enormous body of mythology about the jury, civil and criminal. There is a literature—ignored by the public and by politicians, of course—about what juries *really* do, how much money they award, and so on. *How* they decide is much more elusive. After all, the jury is a notoriously difficult institution to study in the flesh. The work of the jury is secret; the jury goes into a locked room, stays in there, talks and argues, comes out, says a sentence or two, and goes home. Ordinarily, the jury gives no reasons for what it does. Max Weber put the jury in the same category as the Delphic oracle and other forms of irrationality.<sup>11</sup> There is, to be sure, a sizeable and serious scientific literature about jury decisions, some of it based on simulations and role-playing. Those who want to say something about the historical jury, alas, have no such data to fall back on.

Alexis De Tocqueville, interestingly, thought the civil jury meant more for American democracy than the criminal jury.<sup>12</sup> Juries, he thought, "communicate the spirit of the judges to the minds of all the

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7. KALVEN & ZEISEL, *supra* note 3, at 9.

8. The attacks are on what juries do, on a legal system allegedly gone amok. They are not usually explicit attacks on the jury as an *institution*. But of course when newspapers report "absurd" verdicts of millions of dollars for frivolous cases, they are reporting on the behavior of juries.

9. STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 1 (1995).

10. *Id.* This book is an important study debunking the charges against the civil jury.

11. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY 79 (Max Rheinstein ed., 1954). The jury resembles the oracle, "inasmuch as it does not indicate rational grounds for its decision." *Id.*

12. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-85 (Phillips Bradley ed., 1946).

citizens; and this spirit . . . is the soundest preparation for free institutions.”<sup>13</sup> The jury, in his view, was a kind of “gratuitous public school, ever open,” a school that allowed jurors to become “practically acquainted with the laws.”<sup>14</sup> The “political good sense” of the Americans, he felt, was due to the “long use that they have made of the jury in civil cases.”<sup>15</sup>

The jury is also, it is said, one of the cornerstones of American liberty. The civil jury does get a share of the glory, and the right is enshrined, as we all know, in the federal and state constitutions.<sup>16</sup> Yet there is no question that the mystique of the jury *mainly* centers on the criminal jury. The civil jury does not have the same sort of sacred aura. One sign of this lesser status is the erosion of the rule that a jury has to be unanimous. For the *civil* jury, the process began more than a hundred years ago.<sup>17</sup> The California Constitution of 1879 announced that three-quarters of the jury members were enough to render a verdict in civil cases.<sup>18</sup> The same provision existed in Utah in 1892,<sup>19</sup> in Kentucky<sup>20</sup> and Missouri<sup>21</sup> around the turn of the century, and elsewhere as well.

Moreover, the right to a civil jury was never so absolute as the right to a jury in criminal law. Historically, the jury was not available in equity or admiralty cases. It was missing in divorce cases, and in will contests. Presumably, the legislatures of the states *could* have changed these rules and declared them to be historical anomalies; the legislatures could have given the right to all civil litigants. But legislatures, on the whole, did not do this—at least not in a wholesale manner. What cases did and what cases did not go to a jury was something state legislatures and courts wrestled with over the years. Generally speaking, the old law stayed pretty much as it was and it is still there today.<sup>22</sup>

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13. *Id.* at 284.

14. *Id.* at 285.

15. *Id.*

16. In some states, the right to “trial by jury” is to remain “inviolable, and shall extend to all cases in law, without regard to the amount in controversy.” *See, e.g.,* ARK. CONST. art. II, § 7. In the federal constitution and some state constitutions, there is a jurisdictional amount. *See, e.g.,* MD. CONST. DECLARATION OF RIGHTS art. XXIII. In Maryland, the current amount (after an amendment in 1992) is \$5,000. MD. CONST. art. XXIII.

17. With regard to the criminal jury, see HANS & VIDMAR, *supra* note 2, at 171-75.

18. CAL. CONST. of 1879, art. I, § 7.

19. 1892 Utah Laws 44; *see* Hess v. White, 33 P. 243 (Utah 1893).

20. KY. CONST. of 1891, § 248; KY. REV. STAT. § 2268 (1903).

21. 1901 MO. LAWS 190; MO. REV. STAT. § 3782A (1906).

22. The colonists complained about the colonial courts of admiralty, which lacked a jury. *See* Landsman, *Unappreciated History*, *supra* note 6, at 596. But when the United States gained

The civil jury, then, had and still has a somewhat limited domain. Of course, inside that domain, it has a great deal of power. In criminal cases, there was at one time a doctrine or slogan to the effect that the jury was the judge of law as well as fact.<sup>23</sup> It was never exactly clear what this meant, or if it meant anything at all.<sup>24</sup> In any event, judges and statute books stopped repeating this mantra in almost all states after the Revolution.<sup>25</sup>

The percentage of cases that go to the jury, in both civil and criminal cases, has probably been declining since 1800. Charles Clark and Harry Shulman found the civil jury used in less than 4% of the civil cases in New Haven and Waterbury, Connecticut in the decade of the 1920s.<sup>26</sup> Notoriously, most cases never reach the jury; they get settled long in advance of trial. Nonetheless, the jury has a vast influence on the law. The whole massive law of evidence is a tribute to the jury as an institution. Without the jury, nobody would need most of these rules—all that learning about relevance, the hearsay rule, and whatnot might disappear, and the big fat volumes of Wigmore on Evidence and others might be tossed into the garbage. Instead, the trained judge would simply assess the evidence, and separate the wheat from the chaff. This is of course what happens in *most* legal systems. The civil jury is something of an endangered species. The English have just about done away with it; and while the criminal jury has a certain attractiveness overseas, nobody seems to want the civil equivalent.

What is the civil jury? The answer you would get from a lawyer today, is that the civil jury is a body of (usually) twelve people, chosen more or less at random from the general population. The panel of jurors listens to the evidence, finds facts, and comes to a verdict. But if we put it in such simple terms, we leave out a great deal of the story. The jury sits and listens; but to what? The "evidence" it hears has been sifted and winnowed in accordance with the arcane rules we

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independence, the shoe was on the other foot, and the federal government did not modify admiralty law to provide for a jury. Admiralty cases are jury-less to this day.

23. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760-1830*, at 257 n.37 (1975).

24. During the colonial period, however, some cases apparently went to the jury without instructions. An uninstructed jury almost necessarily has to draw its own conclusions about what the law is or might be.

25. Two states, Indiana and Maryland, still have provisions in their constitutions to the effect that the criminal jury "shall be Judges of Law, as well as of fact." IND. CONST. art. I, § 19; MD. CONST. DECLARATION OF RIGHTS art. XXIII. Apparently, these provisions have no real meaning or effect in either state.

26. CHARLES E. CLARK & HARRY SHULMAN, *A STUDY OF LAW ADMINISTRATION IN CONNECTICUT* 28 (1937). In some categories, however, the civil jury was used more frequently. In over 10% of the "auto negligence" cases, there was a jury trial. *Id.*

have mentioned. All this learning, all this doctrine, rests on the theory that juries cannot be trusted to hear certain kinds of information, no matter how relevant these might be. Information has to be carefully pre-digested and approved before it can get to the tender ears of the panel. The jury is systematically "blindfolded" as to "whole categories of available information."<sup>27</sup> A jury, for example, cannot be told that a defendant carries liability insurance.<sup>28</sup>

So, despite the *theory* that juries are mighty and sovereign, these rules are a sure sign that jury power has to be taken with a grain of salt. The law of evidence, as it developed in the nineteenth century, tells a story about *limitations* on the power of the jury. And the limitations are especially marked for *civil* juries. If a criminal jury utters the magic words, "not guilty," the defendant gets up and walks out. Nobody can set this verdict aside, or reverse it on appeal. A civil verdict *can* be set aside. Many people would find rather startling a Connecticut statute, still in effect in 1918, which provided that the court, in a civil case, "may, if it judges the jury have mistaken the evidence and have brought in a verdict contrary to it, return them to a second consideration."<sup>29</sup> If the jury was still stubborn, the judge could send them back into their torture-chamber once more; only if they still stuck to their guns at this point would the judge have to give up and accept their decision.<sup>30</sup> As William Schwarzer and Alan Hirsch neatly put it, the jury is treated with a combination of "veneration and distrust."<sup>31</sup> And the distrust is "pervasive."<sup>32</sup> The practice of prohibiting jurors from taking notes or asking questions, and "the tendency to keep them in the dark about much of what goes on during the trial," are signs of this distrust.<sup>33</sup>

On the other hand, it is certainly possible to tell a story that runs somewhat to the contrary: decline in the power of the judge to control the jury. The Connecticut statute reminds us that at one point the judge could simply tell the jury to go back and try again if the verdict was not to the judge's liking.<sup>34</sup> In its most exaggerated form, this power probably disappeared before the Revolution. Judges remained,

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27. Shari S. Diamond et al., *Blindfolding the Jury*, LAW & CONTEMP. PROBS., Autumn 1989, at 247, 248.

28. *Id.* at 247-49.

29. CONN. GEN. STAT. § 5788 (1918).

30. *Id.*

31. William W. Schwarzer & Alan Hirsch, *The Modern American Jury: Reflections on Veneration and Distrust*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 6, at 399, 400.

32. *Id.* at 399.

33. *Id.*

34. CONN. GEN. STAT. § 5866.

of course, awesome courtroom figures—and they had, potentially at least, enormous power to influence the jury. The judge could, for example, comment freely on the evidence, but legislatures ultimately took away this power. There were traces of this development as early as 1796; the Constitution of Tennessee provided that judges “shall not charge juries with respect to matters of fact.”<sup>35</sup> The movement to cut down on the power of the judge “gathered impetus,” as Robert W. Millar rather irascibly put it, “under that wave of democratization which reached its height about the middle of the nineteenth century.”<sup>36</sup> State after state “succumbed” to what he called an “ill-starred innovation.”<sup>37</sup> By the early twentieth century, whether by statute or high court decision, in most states the judges could no longer comment on the evidence in charging the jury. Indeed, the Arizona Constitution of 1912 ordered judges “not [to] charge juries with respect to matters of fact nor comment thereon;” they were simply supposed to “declare the law.”<sup>38</sup>

In the early nineteenth century, judges actually *explained* the law to jurors. Charges to the jury were usually oral, not written. Judges tended to use simple language, tailored to the case at hand. By the turn of the century, however, the situation had changed in many states: it was the *lawyers* who wrote the instructions, which they then offered to the court, to be accepted or rejected.<sup>39</sup> These instructions were stereotypical and legalistic. They were instructions which did not do much instructing.

Still later, there arose the practice of using canned instructions. In New York, there was an active movement to “standardize” instructions to the jury in the 1920s. Judges of the Superior Court of Los Angeles County prepared a California Book of Approved Jury Instructions (“BAJI”) in 1938.<sup>40</sup> “Approved” meant approved by the courts; these were instructions that had passed muster in some reported case or other.<sup>41</sup> BAJI inspired hosts of imitators,<sup>42</sup> and the rush to codify instructions was on.<sup>43</sup> In a few states, the pattern in-

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35. TENN. CONST. of 1796, art. V, § 5.

36. ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 310 (1952).

37. *Id.*

38. ARIZ. CONST. of 1912, art. VI, § 12.

39. On the history of civil instructions, see 2 ROBERT E. KEHOE, JR., JURY INSTRUCTIONS FOR CONTRACT CASES 1202 (1995).

40. *Id.* at 1221.

41. *Id.*

42. *Id.*

43. *Id.*

structions are actually *mandatory*, and are officially approved by the highest court of the state.<sup>44</sup>

Thus, in the twentieth century, the judge has lost what was once an important source of power—the power to craft his or her own instructions. The judge can pick and choose among instructions that lawyers dish up. This is no small matter. The instructions, however, are pretty much confined to abstract black-letter rules. The judge cannot explain them to the jury in commonsense terms and cannot comment on the case or on the evidence. In this regard, the jury is pretty much on its own and pretty much in command.

Many judges and jurists disliked what was happening to their role in the civil trial. In 1915, when the process had gone very far, Lucilius Emery deplored the decline of the “steadying influence of an able judge” on the jury.<sup>45</sup> The danger that a judge would overawe the jury, if allowed to comment freely, Emery considered grossly exaggerated.<sup>46</sup> He quoted from Justice Samuel Miller, who wrote in 1887, rather cynically, that the party who *demand*s a jury trial is likely to be the “‘party who fancies that, in appeals to the prejudices and feelings of the tribunal which tries his case he may find something which will induce them to depart from the strict law,’” while the party to a suit who feels confidence that, on the law and the evidence he is in the right, “‘is always ready to submit his case to the court without a jury.’”<sup>47</sup>

Justice Miller drew a sharp distinction between the civil and the criminal jury.<sup>48</sup> He was dubious about the value of the civil jury.<sup>49</sup> Without strong guidance, and careful, clear instructions by a learned judge, a (civil) jury trial was actually “a farce.”<sup>50</sup> Nor did Miller think much of the unanimity rule in *civil* cases (he wanted to keep it for criminal cases).<sup>51</sup> He also liked the “authority” of the court to set aside jury verdicts which were in “gross disregard of the weight of evidence.”<sup>52</sup> Emery agreed: the jury needed “some check” on its “impulse . . . to disregard the law or to ignore the fair weight of the evidence.”<sup>53</sup> Edson Sunderland also weighed in on the side of the

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44. *Id.* at 1222.

45. Lucilius A. Emery, *Government by Jury*, 24 YALE L.J. 265, 271 (1915).

46. *Id.* at 272.

47. *Id.* at 272-73 (quoting Justice Samuel Miller).

48. Samuel F. Miller, *The System of Trial by Jury*, 21 AM. L. REV. 859, 865-66 (1887).

49. *Id.* at 865.

50. *Id.* at 863.

51. *Id.* at 866.

52. *Id.* at 863.

53. Emery, *supra* note 45, at 272-73.



judge.<sup>54</sup> The judge, he wrote, in 1915, should act as "a real adviser to the jury."<sup>55</sup> This would get rid of the tricks and the artifices and the "appeals to passion, sympathy and prejudice."<sup>56</sup> Despite all this learned and weighty opinion, nothing was done; and the system, in effect, survives to this day.

It is a system in which, realistically, the judges retain a lot of quiet authority to shape the trial and its proceedings. They also have the power of the law behind them: judges can set aside bad verdicts and they can choke cases off before they ever reach that point. There is considerable evidence—for example, in Randolph Bergstrom's study of tort litigation in New York City from 1870 to 1910—that judges have used the power to dismiss cases with great facility and abandon.<sup>57</sup> To be sure, tort cases that went to the jury at the turn of the century *mostly* ended up with verdicts for the plaintiff. But a large percentage of these claims, in the late nineteenth and early twentieth centuries, failed to get that far. They collided with the judge along the way, and never survived the collision.

Can we draw any conclusions from these two developments—curbing the judge; and curbing the jury? They seem, at first blush, to contradict each other. They might reflect nothing more than the widespread mistrust of power in the American legal system; and the taste for constant checks and balances. The jury counterbalances the judge; and the judge in turn counterbalances the jury. There may also be some kind of fundamental ambivalence toward both the judge and the jury. The jury is the people (in theory); but on the other hand, we do not really trust the people. The judge is the law, the authority, and the government. We vacillate in trusting these institutions too. Consequently, the history of the civil jury and the history of judging are both histories of increasing discipline and bondage.

From the late nineteenth century on, issues of judge and jury were caught up in another real power struggle. I refer to the growing number of tort cases—cases coming out of street railway accidents, factories, and mines—and the beginning of products liability. There was a kind of class war between plaintiffs and defendants in this branch of the law. The plaintiffs, after all, were mostly ordinary people; the defendants were businesses, and often big businesses at that. Prevailing wisdom put the jury on the side of the plaintiffs; and the

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54. Edson R. Sunderland, *The Inefficiency of the Jury*, 13 MICH. L. REV. 302 (1915).

55. *Id.* at 311.

56. *Id.*

57. RANDOLPH BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910*, at 119, 131 (1992).

judge on the other side. The civil jury was supposed to be made up of deep pocket pickpockets, who loved to soak the rich. The idea that juries use the "deep pocket" theory is firmly entrenched in the minds of lawyers and judges. It goes back at least a century. It was commonplace in the late nineteenth century. Charles Francis Adams, Jr., in 1879, wrote that juries "'proverbially have little mercy for railroad corporations'"; railroads, he thought, rather than face a jury, would be well advised to settle out of court.<sup>58</sup>

Of course, all this is a vast oversimplification; but lots of people, then and now, have believed it to be true. Hence, the politics of tort law (and jury law) may have contributed to the moves and counter-moves we have described. The struggle, in a way, is still with us today; and the ups and downs of "tort reform" bear witness to it.

#### NULLIFICATION AND OTHER CRIMES

All lawyers know what juries are *supposed* to do. They are supposed to take the law from the judge, who gives out the law in the form of instructions. The jury then fits these nuggets of doctrine to the actual facts of the case. Juries are not supposed to question the law itself; that is out of bounds. If the jury deliberately ignores the instructions, this is "nullification"; and nullification is considered very bad—lawless in fact.<sup>59</sup>

But if nullification is so awful, why is it that the whole system is set up in such a way that a jury that wanted to nullify can do so very easily? In fact, what is *impossible* is detecting or controlling nullification. This is a system where the jury leaves the courtroom and discusses the case in total isolation and secrecy. Verdicts are brief and gnomic, and the jury is never asked to give *reasons* for what it does or to explain itself in any way. In short, although juries are not supposed to be "lawless," not supposed to toss a coin or decide cases on the basis of prejudice or sympathy, there is absolutely nothing to prevent the jury from doing any or all of these things.

Of course, this system is not irrational. It allows the law to bend, to move a bit this way or that way, without tampering with the brittle rule-structure. It allows for little tiny acts of nullification, which never come to light (and which even the jury may not recognize as such).

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58. PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 271 (1997) (quoting CHARLES FRANCIS ADAMS, *NOTES ON RAILROAD ACCIDENTS* (1879)).

59. There is a large literature on nullification, and there are those who actually advocate it—but, as far as I can tell, all of this concerns criminal trials only. See ABRAMSON, *supra* note 1, at 57-58.

These acts may be *ad hoc* and temporary. The public, as Jerome Frank put it, "turns to the jury for relief from . . . dehumanized justice."<sup>60</sup> Frank himself was not enthusiastic about the system.<sup>61</sup> It led, he felt, to "a capriciousness that is unnecessary and socially harmful."<sup>62</sup> But there is a good case to be made for flexibility. And flexibility, in turn, depends on secret deliberations and laconic verdicts.

This secrecy, however, is one reason why it is so easy for people to believe in the "deep pocket" theory. In many tort cases, for example, there is medical evidence on both sides of the case. Doctor A says the plaintiff is suffering terribly, and the defendant's product caused this suffering. Doctors B and C say this is medical nonsense. The jury is supposed to weigh what Doctor A said against what Doctors B and C said and decide who has the better case. But a jury certainly *could* decide that Doctors B and C have the better argument; but what the hell, the defendant is rich, and the plaintiff is poor, let us give the plaintiff the money. The point is that nobody would ever know the difference.

There is nothing to prevent this from happening. But *does* it happen, in fact? The evidence, in studies of tort cases (past and present) suggests a much more balanced picture. Defendants win in a substantial number of cases. Most cases in fact never go to trial. Many get settled; the judge dismisses others out of hand. In the nineteenth century, an armory of tough doctrines—contributory negligence was one—gave the judge plenty of weapons he could use to get rid of cases.<sup>63</sup> Those that went to the jury were, it is true, usually decided for the plaintiff, but not by any means invariably. Defendants won about one-third of the cases. In some cases, plaintiffs won, but got rather skimpy damages. It is hard to translate awards from 1890 into meaningful sums for the 1990s. But it does seem clear that the *top* awards at least were far less than they are today.<sup>64</sup>

Juries, in other words, were never the cardboard populists that mythology portrays them to be. But there is a lot unknown about historical *patterns* of jury decisions. Tort standards are notoriously vague. Kalven and Zeisel, and others, have shown that criminal juries enforced unwritten laws.<sup>65</sup> Did civil juries have the same habit? Were there unwritten tort laws? Almost certainly the answer is yes. But it

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60. JEROME FRANK, *LAW AND THE MODERN MIND* 175 (1930).

61. *Id.* at 178.

62. *Id.*

63. Landsman, *Unappreciated History*, *supra* note 6, at 606-09.

64. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late Nineteenth Century*, 1987 AM. B. FOUND. RES. J. 351, 366-67.

65. KALVEN & ZEISEL, *supra* note 3.

would take patient research, in long buried documents, to determine the extent to which civil juries enforced unwritten laws.

As we have seen, the jury (*especially* the civil jury) is not the judge of the law; it only decides the facts. But the line between the law and the facts is obviously shaky and indistinct. As Dale Broeder put it, "[w]hen the jury decides if the defendant acted reasonably, it is not deciding a pure question of fact such as whether a dog drowned or the defendant struck Brown."<sup>66</sup>

Civil juries, then, make law, or a sort of law. But they do it quietly; and their work does not leave many visible traces. How they make it, and what sort of law, is rather obscure. And, of course, judges also make law—and much more prominently. The transformation of tort law over the last century or so owes much more to judges than to juries, although juries played a part. This leads us to ask: How different are the minds and hearts of judges compared to juries? Kalven and Zeisel never finished, or published, their study of civil juries; but Kalven, in one article, did leave us one tantalizing tidbit of information.<sup>67</sup> His evidence suggested, pretty strongly, that judges and juries saw tort cases in almost exactly the same light.<sup>68</sup> In civil cases, judge and jury agreed 79% of the time.<sup>69</sup> In the other 21% of the cases, one would expect, from all the whooping and hollering, that judges would tilt more toward defendants. But in fact, disagreements were distributed equally both ways.<sup>70</sup> Judges, in short, were not one whit less or more pro-plaintiff than juries.<sup>71</sup> There is corroboration for this point in a study of traffic negligence cases that went to trial in the late 1920s in the Supreme Court of New York County.<sup>72</sup> In this county, juries gave the nod to plaintiff in just over 70% of the cases.<sup>73</sup> But plaintiffs also won 70% of the bench trials.<sup>74</sup>

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66. Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 406 (1954).

67. Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

68. *Id.* at 1065.

69. *Id.*

70. *Id.*

71. *Id.*

72. Silas A. Harris, *Is the Jury Vanishing*, 7 N.Y.U. L.Q. REV. 657 (1930).

73. *Id.* at 665.

74. *Id.* There is no way of knowing, of course, whether cases where the parties waived jury trials really match jury cases. In New York County, the average judgment for plaintiff was substantially higher in jury cases (\$4,566) than in bench trials (\$3,332). *Id.* Figures for two Massachusetts counties found the jury giving judgment for plaintiff just under 60% of the time; and figures for three Connecticut counties found bench trials more favorable to defendants than jury trials—defendants won just over half the bench trials, but only about 40% of the jury trials. *Id.* But judges in Connecticut gave higher awards! *Id.* What one concludes from this—and other

Nonetheless, the image of wild, runaway, populist juries shows no signs of abating. It is backed up by anecdotes and scare stories.<sup>75</sup> In fact, research makes it clear that the fears are grossly exaggerated.<sup>76</sup> Then why so persistent a mistake or misperception? Of course, big, deviant cases, with huge recoveries, get the most publicity. Nobody is interested in the boring and the normal. A recent study found that national news magazines presented a distorted picture of the tort litigation landscape.<sup>77</sup> The occasional big recovery probably skewed the perception of many people in the nineteenth century too.

In the late nineteenth century, tort law was changing in a slow but steady fashion; there was a retreat from the harsh rules that prevailed in the earlier decades of the century.<sup>78</sup> All aspects of the law, and all institutions, including juries and judges, were becoming more sensitive to the claims of plaintiffs in personal injury cases. Some business people, who sensed this change, and disapproved of it, no doubt blamed it on the jury. It was harder to blame it on the judges, or to attack the judges, than to attack a bunch of ninnies drawn in from the street. After all, it is the jury that actually decides; all the judge seems to do is monitor the case, and wrap it in a package for the jury. The very secrecy of the jury's work, perhaps, made it easier to suspect jurors of blind prejudice. Judges at least had to *defend* what they did with reasons and arguments.

Even today, huge awards are rare, but the media dishes up those few with lip-smacking glee. This conveys the message of a system gone amok. Yet insofar as there is a liability explosion, and there is, it must be laid primarily at the door of the judges, not the jury. Who developed the modern rules of strict liability for defective products? Who dismantled the harsh doctrines of the nineteenth century and replaced them with newer ones that are more friendly to plaintiffs? It was judges, not juries, who created the framework within which juries did their dirty work. Of course, both judges and juries were responding to larger forces in society and in roughly similar ways.<sup>79</sup> In any

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studies—is that the picture is a mixed one. It is abundantly clear that the knee-jerk jury is a myth.

75. See generally Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, LAW & CONTEMP. PROBS., Autumn 1989, at 269 (discussing criticism of civil juries).

76. See, e.g., NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* (1995).

77. Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 427 (1996); see Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585 (1988).

78. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 467-87 (2d ed. 1985).

79. See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985).

event, the whole question of the rise of the liability explosion deserves a lot more research.

### WE, THE PEOPLE

A third point, which is most salient in criminal cases, but relevant in civil cases too, is the question of the jury as a *representative* body. The jury, as we know, has a long history, and has changed its function dramatically over the years. Originally, the jury was a body of neighbors, chosen not because they were unbiased and knew nothing about the case, but for almost the opposite reason. Because of their position in the community, they were in a good position to know or divine the truth. As time went by, the jury evolved and shifted from a panel of knowing busybodies to twelve total virgins of fact.

We are now in the midst of what seems to be a further evolution. The jury is supposed to be, not merely fair-minded and impartial, but fully *representative*. It is supposed to be a cross-section of the community; and this is now taken much more literally—at least as far as race, gender, and the like are concerned.

The notion underlying this shift is what I have elsewhere called plural equality.<sup>80</sup> The general idea is this: American society is segmented, racially, ethnically, by gender, and by class—not to mention other divisions. Each segment has its own norms and viewpoints. No segment, and no set of norms, is superior to any other. Every segment has an equal right to dignity, and to representation. The jury should therefore reflect American diversity. Indeed, a litigant has a *right* to this diversity. Anything else will result in imperfect justice.<sup>81</sup>

Plural equality, as applied to the jury, represents a major break with the past. Russell Duane, writing in 1906 about the abuse of personal injury litigation, is a good example of what came before.<sup>82</sup> Duane felt we needed a “better class of jurors” in such cases.<sup>83</sup> Justice, he thought, “would be greatly forwarded if more jurors could be drawn from the class of men who are in active business for themselves as small traders or otherwise.”<sup>84</sup> Obviously, as far as Duane was con-

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80. I have explored this theme in LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 160 (1990).

81. See the discussion of criminal trials in ABRAMSON, *supra* note 1, at 99-126. Abramson is disturbed by the idea that there might be “not one justice for juries to represent but multiple justices reducible to whom a juror happened to be by race, sex, national origin, religion, occupation, income, educational level, and on and on.” *Id.* at 124.

82. Clarence A. Lightner et al., *The Abuse of Personal Injury Litigation*, 18 GREEN BAG 193, 215 (1906).

83. *Id.*

84. *Id.*

cerned, many people, and probably most people, were simply not fit to serve on a jury, and it would be best to keep them out.<sup>85</sup> Lots of elites, legal and otherwise, no doubt agreed with him.<sup>86</sup>

In some states, the law was quite explicit: jury service was not for everybody. Women of course were excluded.<sup>87</sup> But they were not the only ones. At the turn of the century, the Kentucky statutes provided that a juror, civil or criminal, had to be "a housekeeper, sober, temperate, discreet and of good demeanor."<sup>88</sup> In Tennessee, a juror had to be a "freeholder or householder."<sup>89</sup> In Maine, in 1903, municipal officers were supposed to prepare the lists of jurors.<sup>90</sup> Jurors had to be people of "good moral character, of approved integrity, of sound judgment and well informed."<sup>91</sup> Presumably the town officers decided who was sound and respectable. In Connecticut, too, jurors were supposed to be men "esteemed in their community," people of "good character, approved integrity, sound judgment and fair education."<sup>92</sup> In Pennsylvania, jury commissioners were to select "sober, intelligent, and judicious persons."<sup>93</sup> The commissioners had the duty of eliminating "decrepit, ignorant, intemperate" people.<sup>94</sup> Clearly, in a state like Pennsylvania, jurors were not to be randomly selected; they were picked from a special, elite group.

85. *Id.*

86. An extreme form of this notion, strongly laced with racism, came to the surface when the United States seized the Philippine Islands after the Spanish-American War. The United States did not introduce either the civil or the criminal jury into the legal system of the islands. William Howard Taft, the governor, explained it this way: "Ninety percent of the people are so ignorant that they could not sit on the jury to begin with and understand anything that would be introduced." WINFRED LEE THOMPSON, *THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO, 1898-1905*, at 95 (1989) (quoting William Howard Taft). An act of January 12, 1901 established the right of trial by jury in criminal cases in Puerto Rico. 1902 P.R. LAWS 171.

87. Blacks as well—though not officially.

88. KY. REV. STAT. § 2253 (1903).

89. TENN. CODE § 10006 (1932).

90. ME. REV. STAT. § 3 (1903).

91. *Id.*

92. CONN. GEN. STAT. § 5681 (1918). Jurors had to be at least 25 years old as well. *Id.*

93. *Klemmer v. Mt. Penn Gravity*, 30 A. 274, 276 (Penn. 1894).

94. *Klemmer*, 30 A. at 276. *Klemmer* is an interesting case that sheds some light on how the commissioners actually operated. This was a personal injury case in Berks County. *Id.* Defendant railroad lost at the trial court and appealed on the basis of various procedural irregularities. *Id.* One charge was that the commissioners did not select the jurors from the whole body of qualified electors, but drew up their own lists, by inviting "persons of acknowledged prominence" in the county "to hand in the names of a certain number of persons living in their districts for the purpose of filling the jury wheel." *Id.* The appellate court allowed this practice, because it would be impossible for anybody, in a county with about 30,000 qualified electors, to make such a list without relying on "information derived" from other people. *Id.*

Indeed, a New York law, in the same period (aimed at a single county), explicitly required jurors to be “intelligent.”<sup>95</sup> Not surprisingly, the law did not define this term. In one interesting criminal case, the defendant (convicted of extortion) appealed on the grounds that the jury had been improperly selected.<sup>96</sup> Among other things, he complained about the exclusion of some prospective jurors on the grounds that they were not “intelligent.”<sup>97</sup> The appellate court brushed this objection aside.<sup>98</sup> It was, the Court thought, quite necessary to have such a rule, to counterbalance the older rule “that no person who had formed an opinion and expressed it was qualified to act as a juror.”<sup>99</sup> Because of *this* principle, “the more intelligent men” could be excluded from “serving as jurors in important criminal cases”; and the only ones who would be allowed would be “the more ignorant men.”<sup>100</sup> The court continued:

daily newspapers, especially in the larger cities, are published in great numbers. They place before their readers all the details of [the crime] . . . and report all judicial proceedings. . . . All intelligent men are accustomed to read these newspapers, and may form more or less definite opinions; they may even express such opinions . . . to others. Only the ignorant classes fail to read the newspapers from day to day.<sup>101</sup>

To get an honest, intelligent jury, you have to have “men who have heard and read of the case.”<sup>102</sup> Otherwise, you are doomed to settle for the “ignorant classes.”<sup>103</sup> And the trial judge, using his “judgment and sound discretion,” was the proper one to decide who was, and who was not, sufficiently “intelligent.”<sup>104</sup>

This kind of thinking would, of course, be hissed off the stage today. Plural equality has made these views unacceptable. The Supreme Court upheld the New York “blue-ribbon” jury in 1947, but by a bare

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95. 1905 N.Y. Laws 368. The law applied only to counties with populations of more than 200,000 but less than 300,000. *Id.* Jurors were to be “intelligent; of sound mind and judgment; of good character; of approved integrity; and well informed.” *Id.* A tall order.

96. *People v. McLaughlin*, 37 N.Y.S. 1005, 1008 (App. Div. 1896).

97. *Id.* at 1009.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1009-10.

102. *McLaughlin*, 37 N.Y.S. at 1009.

103. *Id.*

104. *Id.* Justice Miller had expressed just such a view in 1887. See Miller, *supra* note 48, at 867. Miller deplored the fact that the “man who takes an interest in what is going on in public life, who reads the journals and gets the newspaper idea of occurrences in the community,” is excluded; while “the ignorant and stupid, those who take no interest in the world around them,” get to serve. *Id.*



majority (five to four).<sup>105</sup> The whole concept of a "blue-ribbon" jury is suspect today—and for good reason.

At the beginning of the century, as we said, the jury consisted entirely of men. In the South, where most American blacks lived, the juries were entirely white as well; the Southern states kept blacks off the jury by hook or by crook. The Supreme Court held as early as 1879 that states could not *legally* exclude blacks from serving on (criminal) juries.<sup>106</sup> But in most of the South, this decision was a dead letter, and stayed that way until the civil rights era. No statute *formally* declared blacks ineligible; but juries were nonetheless entirely white.

Quite a few states, incidentally, had provisions that put an age cap on juries. In Maine, at the turn of the century, the jury lists were confined to "persons under the age of seventy years."<sup>107</sup> Presumably these old folks were nothing but doddering fools. In some states, instead of an age cap, people of a certain age were allowed to choose: they could serve or not, as they wished. In North Dakota, nobody over sixty could be "compelled" to serve on a jury.<sup>108</sup> This is still the case in some states—for example, in Indiana, where men and women over sixty-five can be relieved of the burden of jury service if they are "desirous" to be excused.<sup>109</sup>

The New York blue-ribbon law is much more about class than about gender or race or age; but demographic and income factors are, of course, hopelessly intertwined. In any event, jury selection has become a more sensitive issue than it had been in the nineteenth century. Plural equality subtly alters the theory of what a jury actually *does*. A "blue-ribbon" jury was assumed to be a better jury than a random jury: better able to find "facts," more impartial, more intelligent than people scooped up off the streets. Today, a rather different, implicit theory hangs in the air: the jury does not simply find "facts," it invents facts. Facts do not exist as such. Facts are socially constructed. Facts are gendered and race-colored and class-colored. They depend on the situation and the way you look at the situation. I am not talking here about the more arcane, post-modern versions of this theory. I am talking about this theory as a gut-level, unspoken

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105. *Fay v. New York*, 332 U.S. 261, 270 (1947). The New York special juries were packed with businessmen and professionals. There were few, if any, women and absolutely no laborers.

106. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

107. ME. REV. STAT. § 2 (1903).

108. N.D. CODE § 814 (1913).

109. IND. ANN. CODE § 33-4-5-7(a) (West 1996).

feeling that has affected the behavior and attitudes of all sorts of people who (happily for them) have never heard of post-modern theory.

Curiously, this development may be, in a way, related to another development in jury law which seems, superficially, to be marching in the opposite direction altogether. Contemporary law has tended to strip professionals and others of their right *not* to be on a jury. Illinois law in 1921 exempted a whole list of occupations from jury duty—public officials from the Governor on down, school teachers, lawyers, ministers of the gospel, “constant ferrymen,” police, pharmacists and druggists, firemen, embalmers and undertakers, and editorial and mechanical staffs of newspapers.<sup>110</sup> Other states had their own lists, more or less similar—North Carolina added to the usual suspects “millers of grist mills,” brakemen and pilots, and members of the state’s National Guard.<sup>111</sup> Some of these exemptions were, of course, based on the idea that society simply cannot spare certain people for jury duty. If you were a “constant ferryman,” for example, in Illinois, you had to be excused from serving;<sup>112</sup> otherwise, who would take people across their rivers? Some notion of necessity was probably the reason why Virginia exempted from service the six “lock keepers of the Dismal Swamp Canal Co.”<sup>113</sup>

In any event, the long list of exemptions meant that lots of professionals and public servants were not to be found on juries. Rich people had their own ways of wriggling out of this public duty. Robert Silverman found, in his study of Boston litigation, in the late nineteenth century, that “the best men rarely served on juries.”<sup>114</sup> Neither, of course, did the worst. Jurors, in other words, tended to be men of the middling sort: not day laborers or vagrants and not rich businessmen or doctors and lawyers, but solid artisans and small shopkeepers.

Today, the trend has been running strongly toward making everybody eligible to serve. The list of exemptions in many states has shrunk to almost nothing.<sup>115</sup> On paper at least, there was and is an enormous amount of begging and pleading and conniving to get off juries, and it is by and large pretty successful. In all fairness, too,

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110. ILL. REV. STAT. ch. 78, § 4 (West 1921).

111. N.C. CODE § 2329 (1939).

112. ILL. REV. STAT. ch. 78, § 4.

113. VA. STAT. § 5985 (1919). Cashiers and bank tellers, and “all persons while actually engaged in harvesting or securing grain or hay or in cutting or securing tobacco” were exempt from jury duty, as well. *Id.*

114. ROBERT A. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900*, at 40 (1981).

115. Note, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1455 (1997).

many people have perfectly valid reasons to get themselves excused.<sup>116</sup> Trials have been getting longer, for one thing. A six-month murder trial—or, worse perhaps, a six-month private anti-trust case—is more than most people can handle in the light of their jobs and family obligations.

Nonetheless, the jury is much more of a cross-section than at any time in the past. It is certainly more diverse racially. Blacks freely serve on juries, North and South. Women serve as often as men, if not more so.<sup>117</sup> It is hard to quarrel with these developments. Whether women or minorities behave any differently than white men serving on juries is still something of an open question. Trial lawyers are convinced that certain classes of people are good or bad for accident cases or criminal trials or whatever. They have their little rules of thumb, their canned intuitions. In the nature of things, they have no hard evidence to back up their guesses; and experiments with simulated juries suggest that these lawyers may be kidding themselves. The facts of the case, the arguments, the actual evidence presented are all “considerably more potent” than “individual differences among jurors.”<sup>118</sup> On the other hand, long experience in picking juries *might* count for something. And in huge cases, where money is no object, big law firms use focus groups, mock juries, and the like, to try to figure out what arguments to make and how to proceed, and to learn what works and what does not.

The case for a “representative” jury, however, does not depend on evidence that such a jury makes a difference to outcomes, although such evidence would be useful. Justice not only has to be done, it has to *look* like it is done. A woman suing in a tort case might find it uncomfortable or unsettling if the whole jury were made up of men. If juries are all lily-white, would you blame a black litigant for doubting her chances for justice? History, of course, would be on her side. At any rate, race and sex discrimination are not supposed to enter into jury selection.<sup>119</sup> That much is clear. But how far should we go in insisting that a jury has to be “representative?” Should it mean, not

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116. Some of these are recognized in the statutes: in Iowa, for example, anyone “solely responsible for the daily care of a permanently disabled person” can be excused if jury service would be a “risk” to the health of that person and the “mother of a breastfed child” can also opt out. IOWA CODE ANN. § 607A5 (West 1996).

117. In criminal cases, the Supreme Court has forbidden the use of peremptory challenges to gain, for example, all-white juries. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); see Barbara A. Babcock, *Jury Service and Community Representation*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 6, at 460.

118. Michael J. Saks, *What Do Jury Experiments Tell Us about How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 10 (1998).

119. *Batson*, 476 U.S. at 89.

just race or gender or ethnic group, but social class and income group? This question is still up for debate.

Nobody knows the future of the civil jury. The states are hacking away at the rule that the jury has to be unanimous. Other aspects of civil juries are also in flux, such as its size. As I said, the civil jury is still controversial. People who complain about crazy decisions, insane awards of damages, who find the hot coffee case at McDonald's<sup>120</sup> appalling, may *think* they are targeting greedy and unscrupulous lawyers; but they are, in fact, calling into question the behavior of judges and juries. Reforms—ceilings on tort recoveries, and the like—are restraints on the power of juries, as well as restraints on the personal injury bar.

The civil jury system unquestionably has its problems. It is an interesting—and flawed—institution. The problems may be worst in complex, technical cases—cases where the ideal decision-maker would be somebody who understood brain chemistry, computers, monopoly theory, or how to navigate through the ins and outs of some complicated financial shenanigans. The civil jury has trouble with such cases. It also has trouble grasping the *legal* complexities of cases. How could it be otherwise, when typically all the the jury learns about the law comes in the form of some densely packed, technical, high-falutin' "instructions."<sup>121</sup> Presumably something could be done about *this*; the law could be changed, allowing judges to instruct juries in everyday language. There are movements in this direction—attempts to write instructions that juries can actually understand.<sup>122</sup> This is all to the good. Still, in *really* technical cases, how are twelve lay people supposed to tell what is scientific trash, and what is not?<sup>123</sup>

Complaints about juries in complex cases are, in a way, similar to the old complaints about letting ordinary boors and nobodies decide cases. Of course, we can also ask how a poor judge is to tell the difference between junk science and real science. After all, what do *judges* know about the physiology of the kidney, or the effect of stress on

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120. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at \*1 (D.N.M. Aug. 18, 1994); *Big Jury Award for Coffee Burn*, N.Y. TIMES, Aug. 19, 1994, at D5.

121. I can cite my own experience of some years back. Together with a colleague, I interviewed members of a hung jury (after the judge discharged them). It had been a long, drawn-out private anti-trust case. The technical details concerned the computer business. This the jury managed to understand (more or less). But the poor jury had absolutely no clue about the *law*, which was dished up to them in the form of canned "instructions" that were completely opaque.

122. See Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520 (1986).

123. Occasionally, litigants have (unsuccessfully) raised the issue—claiming that some case was just too much for ordinary jurors. See *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979).

concrete abutments. Richard Lempert, who studied the issue of juries in complex cases rather carefully, came to the conclusion that there is no real cause for alarm.<sup>124</sup> Juries sometimes do quite well in these cases. Nor is there evidence that judges would do any better.<sup>125</sup>

This is not surprising. After all, judges are more or less amateurs too. They are not specially trained for the job, the way European judges are; they are ordinary lawyers—or worse, *political* lawyers. This is not to deny that judges can gain experience, if they sit long enough on the bench, in handling particular kinds of cases. But their training, such as it is, does not and cannot include all the issues of science and technology that *might* come before them in actual cases.

I doubt that many people today think of the jury as a kind of school for democracy; or as necessary for a system of popular justice. Certainly, there is no such halo around the civil jury. But it is hard to separate the civil jury from the rest of the texture of the American justice system. Most cases never get to the jury; but they may be decided in the shadow of what a jury is thought likely to do.

The civil jury may also play some part in legitimating the legal system. And many of us have a certain affection for the civil jury, despite its faults. It is something we are used to. It has the comfortable and affectionate patina of history. Old cities that grow over the centuries, all higgledy-piggledy, with crooked streets and ancient, tumble-down houses, always seem more beautiful than new, planned, “rational” cities. Who knows? Some legal institutions may, in a way, be like that too.

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124. Richard O. Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 6, at 181, 214.

125. *Id.* at 182.